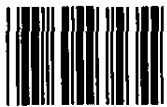


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CLERK, U.S. DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

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Counsel for Defendant
RUSSELL J. CONTE

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,
Plaintiff,
v.
RUSSELL J. CONTE,
Defendant.

CR Case No. 98-0519-JM
Sentencing: 12/18/98
8:30 a.m.
DEFENDANT'S
OBJECTIONS TO PRE-
SENTENCE REPORT

COMES NOW the DEFENDANT, RUSSELL J. CONTE (CONTE), by and through counsel undersigned, and hereby files his Objections to the Presentence Investigation Report (PSR).

1. Pages 2 - 4, The Offense Conduct. The offense conduct description makes it sound as if CONTE ab initio, developed the scheme, when in fact it was a scheme devised by LYNN BOGART and CARMEN LUCCI. Moreover, the description of CONTE'S conduct makes it appear as if MURDOCK reasonably relied on CONTE, when in truth, MURDOCK had a chief financial officer, HUGO BOREN, who was involved in the discussions, and in fact, advised MURDOCK against the subject investment. According to CONTE, BOREN indicated that he thought it sounded like a good idea but did not know much about the business; thus he was against the investment and told MURDOCK as such.

H

1 MURDOCK, rather than relying on his long-time trusted financial
2 officer, relied on CONTE, who, as known to MURDOCK, was a convicted
3 felon, convicted of defrauding others.

4 In fact, CONTE met BOGART and LUCCI for the first time when
5 MURDOCK MET THEM IN Utah IN 1993. Attending that meeting was HUGO
6 BORNE. At that meeting, or soon after, BOREN expressed to MURDOCK and
7 CONTE his suspicions concerning the investment because he believed
8 that LUCCI was dressed like and acted like a mobster; LUCCI wore a
9 full-length mink coat. This was not a situation of MURDOCK relying
10 merely on CONTE; rather, MURDOCK, in his typical style as owner of
11 NATURE'S WAY, talked to not only CONTE, but to BORNE and others for
12 advice as to what he should do. {NATURE'S WAY, CONTE believes, is the
13 world's largest manufacturer of vitamins and other supplements.} Thus,
14 statements such as "more" persuasion by RUSSELL," PAGE 3, LINE 32, is
15 at best misleading because MURDOCK continued to rely not only on
16 CONTE, but on others. It was not until MURDOCK had paid \$1,280,000
17 net to BOGART ($200 + 650 - 22 + 650 = 1,280$) that CONTE became aware of
18 the fraudulent scheme perpetrated on MURDOCK and CONTE by BOGART and
19 LUCCI. See plea agreement, pg. 8, para. 4. Before that time, both
20 CONTE and MURDOCK went to San Diego to check out BOGART'S business
21 practices, and BOGART defrauded both CONTE and MURDOCK by showing
22 storage containers with boxes of paper which BOGART claimed evidenced
23 that the investment was valid and solid.

24 At page 4, line 13, it is indicated that CONTE and BOGART were
25 to "split the net proceeds of MURDOCK'S final investment." A point of
26 clarification is in order: the proceeds were divided, not split
27 equally.

2. Page 4, Victim Impact Statement. MURDOCK'S reliance on CONTE was unreasonable. See discussion at para. 6, *infra*.

3. Page 6-8, line 27, Criminal Convictions and Criminal History Computation. By order dated September 29, 1998, copy attached as EXHIBIT A, the District Court Judge in the Utah state case vacated the judgment and conviction. Thus, there is no Utah state judgment and conviction. See U.S.S.G. §4A1.2(a) (prior sentence defined), application note 6 (vacated convictions). See e.g., *U.S. v. Guthrie*, 931 F.2d 564, 570-72 (9th Cir. 1991) (vacated state conviction not / counted). Therefore, CONTE does not receive 1 point for a Utah state conviction as indicated in the PSR.

Under Application Note 6, *supra*, we find references to sentences, "Reversed, Vacated, or Invalidated Convictions." The note states in part: "Sentences resulting from convictions that (A) have been reversed or vacated because of errors of law or because of subsequently discovered evidence exonerating the defendant" As evidenced by CONTE'S "Motion to Set Aside Plea of Guilty and Judgment of Conviction," EXHIBIT B, page 1, para. 1, filed recently in the Utah state court, CONTE claimed that the Utah sentence should be vacated because of an error in law, the motion stating in part:

The plea did not conform with requirements of the Utah Rules of Criminal Procedure under Rule 11 and the plea was an involuntary plea and unconstitutional pursuant to the United States Constitution and Utah Constitution.

(Noteworthy also is the fact that contrary to the PSR, CONTE "completely paid off in full the restitution and victim, Rex Henderson, has no objection to the setting aside of the plea." *Id.*, para. 2. See PSR at 6-7.) Based on the motion and memorandum in

1 support of the motion, the Utah state court vacated the sentence.

2 EXHIBIT C.

3 In addition, as to the Utah federal case, page 7 of the PSR, the
4 sentence in this case was modified from six months incarceration to
5 six weeks incarceration. See EXHIBITS D and E, Motion to Modify
6 Sentence and transcript, respectively. Therefore, under U.S.S.G.
7 §4A1.2(b)(2), DEFENDANT is to receive 1 point, not 2 points. Section
8 4A1.1(b) causes an additional 2 points "for each prior sentence of
9 imprisonment of at least sixty days" But §4A1.2(b)(2) states
10 that "If part of a sentence of imprisonment was suspended, 'sentence
11 of imprisonment' refers only to the portion that was not suspended."
12 "Sentence of imprisonment" means "a sentence of incarceration."
13 §4A1.2(b)(1). See also, §5C1.1(c)(1), (2) and (3), Imposition of Term
14 of Imprisonment, which makes clear that a "sentence of imprisonment"
15 does not include "intermittent confinement, community confinement, or
16 home detention," all of which can be substituted for a "sentence of
17 imprisonment," meaning that they do not equate to a "sentence of
18 imprisonment." In other words, the six weeks for which CONTE was
19 sentenced by the federal court in Utah to the Community Treatment
20 Center is not included as a "sentence of imprisonment."

21 In the federal case in Utah, on September 24, 1992, CONTE filed
22 a Motion to Modify Sentence, EXHIBIT D, stating that "This motion is
23 based upon the information from the defendant's treating physician to
24 be submitted to the court and counsel prior to the hearing which
25 indicated that defendant's diagnosed mental condition has deteriorated
26 and good cause exists to place the defendant in confinement other than

27 / / / /

1 the Davis County Jail." At pages 6 and 7 of the transcript, EXHIBIT
2 E, the court stated:

3 The report from the doctor is one of serious portent
4 and deserves the consideration which you've requested.
5 I've talked with the probation agent. I'm determined
6 to correct the three months in jail, jail type
7 facility, to six weeks, which would mean he had
8 completed that, and then six weeks in the CTC
9 ["Community Treatment Center"/"Community Confinement"]
10 and then three months in a home. (Emphasis added.)

11 The district court suspended about six weeks of imprisonment; the
12 three months/12 week sentence of imprisonment was changed to six
13 weeks. (Three months is about 12 weeks; less six weeks leaves six
14 weeks of imprisonment.) Under \$4A1.1(b) (and (c)), CONTE'S sentence
15 of imprisonment was six weeks, which is about 45 days, which is less
16 than 60 days; thus, CONTE receives 1 point for the Utah federal
17 conviction. The criminal history computation, then, is 1 plus 2
18 equals 3, which places DEFENDANT in Criminal History Category II, not
19 Category III.

20 CONTE objects to the IRS agent's characterization at PSR page 8
21 that the false tax returns were related to the insurance claim. There
22 was absolutely no relation.

23 4. Page 9-11, Health/Substance Abuse/Identifying
24 Characteristics. The IRS PSR points out an alleged discrepancy
25 between CONTE'S insurance claims - CONTE is spending his time "mostly
26 in bed due to panic attacks" (sic) and CONTE'S travel. An
27 understanding of the bi-polar condition is required: up or down, no
28 in between. When depressed, CONTE spends days at a time in bed. When
manic, CONTE cannot sit still. He might be depressed for days and at
other times manic for days. In the extreme, the manic phase results

1 in panic attacks. (When he is in bed it is due to the depressed
2 phase, not the panic attacks.)

3 5. Page 13, Sentencing Summary/Guidelines Manual Used. The
4 November 1, 1998 manual should be used, not the November 1, 1998
5 manual, given that CONTE is sentenced after November 1, 1998. As
6 discussed, infra, there are changes in the manual, effective November
7 1, 1998, with respect to diminished capacity.

8 6. Page 13, Offense Level Computation/Specific Offense
9 Characteristic/Position of Trust. CONTE objects to the 2 point
10 increase for position of trust under U.S.S.G. §3B1.3. First, it
11 should be noted that MURDOCK'S claimed reliance on CONTE was clearly
12 unreasonable, given that MURDOCK knew, inter alia, that:

13 a. CONTE had mental problems (diminished capacity/bi-
14 polar condition);

15 b. CONTE had been convicted of a felony in federal
16 court in Utah for failure to pay taxes and spent time in jail;

17 c. CONTE was on probation for the federal offense;

18 d. CONTE repeatedly failed in his business ventures.

19 Thus, it can hardly be said that MURDOCK, a sophisticated
20 businessman who owned a multi-million dollar business, could have
21 relied upon CONTE as his friend and/or financial advisor for
22 sophisticated financial advice involving hundreds of thousands of
23 dollars. What we have here is a situation of, at best, friendship,
24 which is not sufficient to cause a 2 level increase under §3B1.3.
25 See, e.g., U.S. v. Pardo, 25 F.3d 1187, 1190 (3rd Cir. 1994) and U.S.
26 v. Mullens, 65 F.3d 1560 (11th Cir. 1995). In Pardo, defendant's
27 personal friendship with a bank manager played a role in bank fraud
28

1 but the friendship did not support a sentence enhancement because "at
2 most, [defendant's] position as a friend allowed him an opportunity
3 to commit an easily detectable wrong...." Likewise in Mullens, where
4 defendant took advantage of personal friendships at a country club to
5 solicit investors in a ponzi scheme he devised. The Eleventh Circuit
6 rejected the enhancement because defendant "was not in a position of
7 trust simply by virtue of developing ordinary social relationships."

8 Here, CONTE and MURDOCK were close friends. DEFENDANT was not
9 licensed as an attorney, accountant, financial advisor, financial
10 planner, stockbroker, or the like. Nor did DEFENDANT hold out to
11 MURDOCK that CONTE held expertise in the area of business investments.
12 Quite to the contrary, by CONTE'S track record of repeated failing
13 businesses. CONTE was a perfect example as to how not to proceed in
14 business matters. MURDOCK was on notice of CONTE'S personal (mental,
15 emotional and financial) and professional (business/financial)
16 shortcomings. Apparently, MURDOCK was, at the time, in need of a
17 friend, and/or played out his role of loyal friend to CONTE. And,
18 MURDOCK had a business manager, one who in fact was against the
19 subject investments. That MURDOCK foolishly listened to CONTE, not
20 to MURDOCK'S business manager, attests to MURDOCK'S lack of business
21 judgment, not to any position of trust held by CONTE.

22 Moreover, CONTE disputes much of what MURDOCK claims, found at
23 pages 4 and 5. A better understanding of the CONTE-MURDOCK
24 relationship and its background is in order. CONTE and MURDOCK were
25 very close friends, which friendship began circa 1992. MURDOCK was
26 undergoing marital problems and in fact was separated from his wife
27 and lived in a condo and kept begging CONTE to live in the condo with
28

1 him. CONTE and MURDOCK would spend considerable time together,
2 including not only working out, but going to basketball games and
3 restaurants. MURDOCK was very much taken back when CONTE married and
4 did not have the time to spend. In fact, CONTE and his family moved
5 to Arizona for purpose of getting away from MURDOCK, given MURDOCK'S
6 overbearing, controlling, and manipulative personality. MURDOCK'S
7 claim that CONTE "was the key to the entire fraud," page 4, line 36,
8 is belied by the probation officer's recognition that but for BOGART
9 and his scheme devised ab initio, by BOGART, there would have been no
10 involvement by CONTE in this MURDOCK fraud.

11 MURDOCK did not hire CONTE as a "financial advisor at a salary
12 of \$4,000 per month," page 5, line 6. Rather, MURDOCK, knowing of
13 CONTE'S sordid background and financial difficulties, agreed to loan
14 CONTE about \$50,000. In fact, an amortization statement was prepared
15 by MURDOCK'S CPA firm at MURDOCK'S request. (CONTE has a copy.) See,
16 also, page 5, line 21, where MURDOCK claims he paid CONTE "over
17 \$50,000." Again, this was a loan. CONTE has checks showing interest
18 payments from CONTE to MURDOCK.

19 CONTE also contests MURDOCK'S claims, page 5, lines 27 - 33. In
20 fact, other friends of MURDOCK and CONTE, suffered financial losses
21 after investing with CONTE. These friends and their fraud loss
22 referenced in CONTE'S plea of guilty were all well-known to MURDOCK
23 before MURDOCK agreed to the BOGART investment. CONTE denies that he
24 told MURDOCK that he "had hidden \$400,000 from the IRS during a tax
25 investigation." He also denies that he told MURDOCK that CONTE pled
26 guilty in the Utah federal / / / / / / / / / / / / / / / / /
27 / / / /

1 case, even though he was not guilty, and that he had been duped by
2 someone else. Page 5, lines 3- 5.

3 CONTE also denies he wanted to be paid by gift or loan to avoid
4 problems with IRS, page 5, lines 16 - 18, and that he hid \$400,000
5 from the IRS, page 5, lines 32 - 33.

6 Of the approximately \$616,000 proceeds received by CONTE,
7 \$250,000 of that was loaned by CONTE to BOB JONES, president and major
8 stockholder of Commonwealth Thrift, an FDIC thrift, and secured by
9 stock in that bank. Circa early 1995, CONTE told MURDOCK that when
10 the note came due at the end of September, 19, 1995, CONTE would give
11 the proceeds to MURDOCK or if JONES could not pay the note off, CONTE
12 would assign the note to MURDOCK. MURDOCK instructed CONTE to have
13 JONES sign the note with MURDOCK'S company, MI, LC, which was done in
14 November of 1995. See Exhibit 5. Commonwealth was to provide a
15 credit card program designed specifically for sub-prime borrowers.
16 However, some time in the middle of 1996, Commonwealth was taken over
17 by the FDIC regulators due to liquidity problems. In effort to held
18 MURDOCK get his money back, CONTE placed phone calls two or three
19 times a week for four years for follow-up, updates and brainstorming,
20 which should demonstrate CONTE'S post-offense rehabilitation.

21 7. Page 15, Factors That May Warrant Departure.¹ In the
22 Sentencing Commission's changes to the Guidelines, effective November
23

24 ¹ CONTE recognizes that under local criminal rule 32.1(a)(7), his objections "should not
25 include arguments for aggravation or leniency, unless based on claimed errors in the presentence
26 report." (Emphasis supplied.) Here CONTE disagrees with the probation officer's downward
27 departure analysis and therefore, provides some argument.

1 Sentencing Commission's changes to the Guidelines, effective November
2 1, 1998, the Commission shows greater deference for diminished
3 capacity as a basis for downward departure. The Commission has
4 amended the diminished capacity section, §5K2.13 by Amendment No. 8,
5 stating:

6 This Amendment (A) address a circuit conflict by
7 allowing a diminished capacity departure if there is
8 sufficient evidence that the defendant committed the
9 offense while suffering from a significantly reduced
10 mental capacity, except under three circumstances [not
11 applicable here]; and (B) adds an application note
12 that defines "significantly reduced mental capacity to
13 include both cognitive impairments (i.e., an inability
14 to understand the wrongfulness of the conduct or to
15 exercise the power of reason) and volitional
16 impairments (i.e., an inability to control behavior
17 that the person knows is wrongful), based on the
18 decision in United States v. McBroom, 124 F.3d 533
19 (3rd Cir. 1997).

20 Under the old §5K2.13 we find:

21 If the defendant committed a non-violent offense while
22 suffering from significantly reduced mental capacity
23 not resulting from voluntary use of drugs or other
24 intoxicants, a lower sentence may be warranted to
25 reflect the extent to which reduced mental capacity
26 contributed to the commission of the offense, provided
27 that the defendant's criminal history does not
28 indicate a need for incarceration to protect the
public. (Emphasis supplied.)

Due to conflict in the circuits as to what constituted a non-
violent offense, the Commission has amended this section to include
violent as well as non-violent offenders, which amendment demonstrates
the Commission's growing concern and greater deference for diminished
capacity as a basis for downward departure. Moreover, even before the
amendment to this section, it is clear that the courts gave great
deference to diminished capacity with respect to non-violent
offenders.

1 While it is true that the Commission provides for downward
2 departure "provided that the defendant's criminal history does not
3 indicate a need for incarceration to protect the public," this is not
4 to say that a downward departure is not warranted where some term of
5 incarceration will be served despite the departure.

6 The case of U.S. v. Mary Ann Herbert, 902 F.Supp. 827 (N.D. Ill.
7 1995) is instructive. Herbert plead guilty to embezzlement and tax
8 fraud. In order to "salvage her failing company," she started
9 gambling. Winnings did not cover the debts. Herbert embezzled
10 \$70,000 from a pension fund. Herbert's psychiatrist concluded that
11 Herbert suffers "an ongoing psychiatric illness ... [and] displays a
12 number of features which are often seen in individuals with mixed
13 personality states that include narcissistic, histrionic and
14 borderline features." The psychiatrist further explained that
15 Herbert's illness "causes a depressed state prompting Herbert to
16 question her own worth, make poor decisions, and then offer excuses
17 to compensate for her shortcomings." The court ordered a second
18 psychiatric evaluation to determine whether Herbert's psychological
19 difficulties contributed to her criminal actions. The court found that
20 Herbert had, in fact, been impaired at the time of the offense. The
21 psychiatrist stated:

22 In my opinion, Ms. Herbert suffered cognitive
23 difficulties (poor concept formation and poor ability
24 to understand or judge situations) and emotionally
25 driven decision making. Her behaviors and thought
26 patterns were influenced by her impaired mental
27 condition which include a severe depressive disorder
28 compounded by a pathological gambling disorder and
alcohol dependence. The consequences of her
personality disorder which included her feelings of
inadequacy (which impacted upon her ability to lead or
administer a corporation) resulted in extremely poor

1 decision-making which consequently led to the charge
2 against her. Her inability to cope with the sequence
of events resulted in her suicide attempt.

3 Ms. Herbert's mental state at the time of the
4 offense was extremely impaired. As a direct result of
an active depressive illness compounded by her mix
5 personality state, her perception of her faults and
weaknesses, in addition to her limited coping capacity
6 and poor judgment subsequently resulted in a reduced
mental capacity during the period of time immediately
preceding, during, and after the offense.

7
8 Relying upon U.S. v. Lewinson, 988 F.2d 1005 (9th Cir. 1993) and
9 U.S. v. Frazier, 979 F.2d 1227 (7th Cir. 1992), the district court
10 granted Herbert's request for a downward departure, and although
11 Herbert's total offense level was 13, she was placed on probation for
12 a term of 42 months and placed on home confinement for the first six
13 months of probation.² In granting Herbert a downward departure, the
14 court stated:

15 In sum, all that Frazier and Section 5K2.13 require is
16 that (1) the defendant suffered a diminished mental
capacity at the time of the offense, and (2) the
17 mental impairment contributed to the commission of the
crime.

18 In addition, CONTE is entitled to a downward departure for post-
19 offense rehabilitation/super acceptance of responsibility. After the
20 offense and prior to notice of a criminal investigation, CONTE caused
21 MURDOCK to recover a substantial amount of his fraud loss: \$200,000
22 in cash recovered. CONTE also assigned to MURDOCK a note which CONTE
23 believed was worth \$250,000, secured by stock in a company but proved
24 worthless, plus CONTE gave MURDOCK a note for the balance owed, plus

25 ² The reported case does not state the number of levels

26 departed. However, a review of the judgment indicates the Guideline calculation before
27 departure and reveals the sentence of probation/home confinement.

1 interest, approximate total amount of \$2.5 million plus interest.
2 Downward departures for both post-offense and post-sentence
3 rehabilitation are permitted by the Ninth Circuit. See, e.g., U.S.
4 v. Green, 152 F.2d 1202, 1206-08 (9th Cir. 1998) (post-sentence
5 rehabilitation downward departure affirmed; court recognizes, at 1206,
6 "no difference between post-offense rehabilitation and post-sentencing
7 rehabilitation).

8 CONTE claims the following early restitution/rehabilitation/
9 remorse/etc. factual basis:

10 a. July, 1994. CONTE paid MURDOCK \$100,000;

11 b. August, 1995. CONTE paid MURDOCK \$120,000, signed an
12 agreement to pay all monies back, and assigned a note to MURDOCK in
13 the amount of \$250,000, secured by corporate shares and Commonwealth
14 Thrift, a California corporation. See EXHIBIT F, a copy of the
15 assigned note, and EXHIBIT G, a copy of the note.

16 c. February, 1998. Indictment. Thus, July, 1994 and
17 August, 1995 are 43 and 30 months, respectively, prior to indictment.

18 See also U.S. v. McBroom, 991 F.Supp. 445 (D.N.Y. 1998) (on
19 remand district court departed downward one level for diminished
20 capacity and two levels for post-offense rehabilitation).

21 CONTE also raises additional grounds for departure and reserves
22 the right to present additional grounds by way of his pre-sentence
23 memorandum. For example, the court should take into consideration
24 downward departure based on the fact that CONTE was not aware of the
25 grand scheme of BOGART and LUCCI when CONTE initially advised MURDOCK.
26 What CONTE did was fail to disclose to MURDOCK the fact that CONTE was
27 to receive a 10% commission on all monies paid over to BOGART and
28

1 LUCCHI. CONTE did not know, ab initio that BOGART and LUCCHI were
 2 perpetrating a fraud upon MURDOCK. In other words, CONTE was suckered
 3 into the scheme, no less than MURDOCK. See, e.g., Plea Agreement at
 4 page 8, para. r:

5 After Murdock made the \$650,000 investment, defendant
 6 found out that the whole investment scheme was a
 7 fraud. Instead of telling Murdock, he demanded that
 Bogart make him a 50% partner in the proceeds of all
 future investments by Murdock. (Emphasis supplied.)

8 By this time, which was after MURDOCK had paid \$1,280,000 net to
 9 BOGART: $200 + 650 - 220 + 650 = 1,280$. That post-Koon³ the Ninth
 10 Circuit gives wide latitude to the district court in making a downward
 11 departure determination is best evidenced by the very recent case of
 12 U.S. v. Sanchez-Rodriguez, __ F.3d __, 1998 W.L. 81855 (9th Cir. 1998)
 13 (en banc). In Sanchez-Rodriguez, decided November 20, 1998, the
 14 district court departed from a range of 77 - 99 months down to a 30-
 15 month sentence on grounds that: (1) the amount of drugs was small; (2)
 16 delay in charging and sentence; and (3) waiver of deportation hearing.
 17 The government agreed only as to (3) and appealed on (1) and (2), but
 18 the sentence was affirmed by the Ninth Circuit.

19 The probation officer should consider other grounds for downward
 20 departure, including the following:

21 a. Cumulative factors (singly and in combination), \$5K2.0.

22 See, e.g., U.S. Mena, 968 F.Supp. 115 (E.D. N.Y. 1997) (downward
 23 departure 15 levels based on a number of factors singly and in
 24 combination, including \$5K2.12, coercion and duress, because defendant
 25 was dominated, manipulated and pressured by his older brother).

26
 27 ³ Koon v. U.S., 116 S.Ct. 2035 (1996).

1 Moreover, this court should take into consideration civil tax
2 penalties and interest imposed upon CONTE which factors are not taken
3 into consideration by the Guidelines.

4 b. Extent of Defendant's Remorse is Demonstrated by
5 Defendant's Post-Offense Rehabilitation. See, e.g., U.S. v.
6 Jaroszenko, 92 F.3d 486 (7th Cir. 1996).

7 c. Koon departure review standards. Under the 1999
8 edition, we find an amendment to §5K2.0: "This amendment (A)
9 incorporates into the general departure policy statement the principle
10 holding and key analytical points of the United States Supreme Court's
11 decision in Koon v. U.S., 518 U.S. 81 (1996); (B) removes the language
12 that is inconsistent with the Koon holding; and (C) generally enhances
13 the precision of the language of the policy statement." (Amendment
14 #10 to 1999 edition.)

15 d. Combination of individual characteristics. U.S.S.G.
16 §5K2.0 (Old Amendment 508). The Commission in its commentary to the
17 amendment noted that it was not foreclosing the possibility "in an
18 extraordinary case, that a departure could be based upon a combination
19 of individual offending characteristics." 59 Fed.Reg. 23608, 23610
20 (May 5, 1994). See, e.g., U.S. v. Cook, 938 F.2d 149, 152-53 (9th
21 Cir. 1991) (court stated that where individual factors would not
22 justify departure, a combination of those same factors may constitute
23 mitigating circumstances justifying a departure).

24 e. Other extenuating and mitigating circumstances. See,
25 U.S. v. Brennick, 949 F.Supp. 32 (D. Mass. 1996) in which the district
26 court held that defendant's conduct in initially paying his
27 withholding taxes late before he stopped paying them at all, financial
28

1 conditions in the industry which contribute to the failure of the
2 defendant's business, and the fact that the applicable Guideline
3 overstated the seriousness of the offense, all justified a downward
4 departure. Here, the loss/seriousness is overstated as to CONTE
5 because CONTE was not aware of the scheme until after MURDOCK paid
6 BOGART the second \$650,000, at which time MURDOCK paid a net of
7 \$1,280,000: $200 + 650 - 220 + 650 = 1,280$. See plea agreement, page
8 8, para. 12.

9 f. Extraordinary acceptance of responsibility. See e.g.,
10 U.S. v. Rogers, 972 F.3d 489, 493 (2nd Cir. 1992) (defendant turned
11 himself in the day after committing the bank robbery); U.S. v. Brown,
12 985 F.2d 478, 482-83 (9th Cir. 1993) (same); U.S. v. Lieberman, 971
13 F.2d 989, 996 (3rd Cir. 1992) (defendant paid more in restitution than
14 he actually owed, resigned from position at bank, explained how to
15 detect improper transactions in the future); U.S. v. Miller, 991 F.2d
16 552, 553-54 (9th Cir. 1993) (remand to determine if extraordinary
17 restitution justified departure).

18 The same facts that apply to CONTE'S post-conduct rehabilitation
19 apply to this factor. See, e.g., U.S. v. Evans, 49 F.3d 109, 112-115
20 (3rd Cir. 1995) (remanding for resentencing; relying, in part, on
21 amendment to U.S.S.G. §5K2.0 Commentary). In Evans, the Third
22 Circuit, citing Gaskill, infra, held that a downward departure might
23 be appropriate based on extraordinary acceptance of responsibility
24 where defendant revealed his true identity to probation officer, which
25 otherwise would have remained undiscovered.

26 g. Fair and reasonable sentence. See, e.g., U.S. v.
27 Gaskill, 991 F.2d 82, 86 (3rd Cir. 1993) (court stated that "district
28

1 judges need not shrink, however, from utilizing departures when the
2 opportunity presents itself and when circumstances require such action
3 to bring about a fair and reasonable sentence."

4 See, e.g., U.S. v. Gaskill, 991 F.2d 82, 86 (3rd Cir. 1991) in
5 which the court stated that "District judges need not shrink, however,
6 from utilizing departures when the opportunity presents itself and
7 when circumstances require such action to bring about a fair and
8 reasonable sentence."

9 8. Page 15-17, Probation Officer's Analysis/Justification.
10 CONTE objects to the analysis/justification of the probation officer
11 in general and with the following particulars. Murdock's investment
12 was not reasonably induced by any degree, much less to a "critical
13 degree by the trust [Murdock] had in the DEFENDANT...." This is not
14 CONTE'S third criminal conviction overall; it is his second, and his
15 second felony conviction resulted in a sentence of imprisonment of 6
16 weeks. CONTE does not have one prior misdemeanor, and as noted in
17 para. 2, supra, based on CONTE'S bi-polar disorder, the federal court
18 in Salt Lake City did modify CONTE'S sentence in 1992 to incarceration
19 of 45 days, that time having already been served. While it is true
20 that CONTE'S "initial acts in the [subject] offense were more or less
21 simultaneous with his plea for modification" to the federal court in
22 Utah, and that CONTE was on supervision from the Utah federal case
23 "during the entire life of the instant offense," this should come as
24 no surprise, given CONTE'S bi-polar condition, which as Dr. Guernsey
25 will testify, contributed to the commission of the offense.

26 9. Page 17-18, Sentencing Recommendation.

27 Given the above objections, the Guideline calculation is as
28

1 follows: Base offense level of 6, plus 13 for fraud loss, plus 2 for
2 minimal planning, equals an adjusted offense level of 21. 21 less 3
3 for acceptance of responsibility is a total offense level of 18. The
4 Criminal History score is 3 for Criminal History Category II. Thus,
5 the Guideline range is 30-37 months. In addition, CONTE is eligible
6 for a downward departure based on diminished capacity under §5K2.13.
7 CONTE recommends substantial downward departure for diminished
8 capacity and post-offense rehabilitation/super acceptance of
9 responsibility

10 CONTE disagrees that his bi-polar manic/depressive condition is
11 belied by his claim "that he spends almost all of his time in bed or
12 at home." One needs to fully understand the bi-polar condition to
13 understand that an individual could be bedridden with deep depression
14 for days at a time (the depressive phase) and at other times have
15 spurts of energy and restlessness which would cause him to travel (the
16 manic phase). Moreover, CONTE's "more luxurious lifestyle than most"
17 is not relevant. That lifestyle is not based upon monies obtained as
18 a result of the instant offense, but is based upon the fact that CONTE
19 receives \$8,000 in insurance proceeds. While many of us would be more
20 prudent with their finances, "saving for a rainy day," the fact that
21 CONTE has chosen a comfortable lifestyle should not be a factor of
22 consideration with respect to whether he truly suffered and continues
23 to suffer from a bi-polar condition. While CONTE can understand why
24 some may view his bi-polar condition with a cynical eye, consider
25 this: who in their right mind would agree to electric shock treatments
26 in an attempt to defraud an insurance company? Consider, too, the
27 fact that the probation officer's distrust of CONTE'S serious bi-polar

condition is in effect a distrust of the diagnosis of Dr. Guernsey, et al. A better understanding of the manic depressive/bi-polar condition is in order, and CONTE will submit medical further information to the probation officer and court.

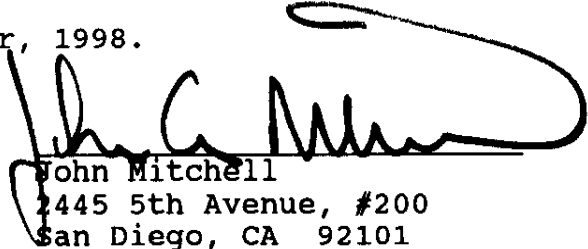
Finally, the probation officer misses the mark with respect to the exception to a 5K2.13 diminished capacity departure: "provided the criminal history does not indicate a need for incarceration to protect the public." The question here is not whether CONTE should be incarcerated to protect the public, but for how long he should be incarcerated to protect the public. For example, at offense level 18, Criminal History Category II, CONTE faces a Guideline range of 30-37 months. With a six-level departure, CONTE receives an offense level of 12, Zone C, and faces a Guideline range of 12-18 months. CONTE will submit to the court a pre-sentence memorandum outlining what he believes to be a fair sentence in this case.

10. Page 18, Fine. With a total offense level of 17 and a Guideline range of 2, the fine range is \$6,000 - \$60,000.

11. Sentencing Summary Chart. For reasons stated above, the total offense level is 18, Criminal History Category II, with a range of 30-37 months before downward departure.

EXHIBITS	A	Utah State court order
	B	Motion to Set Aside Plea of Guilty and Judgment of Conviction
	C	Vacate Sentence - Utah state court
	D	Motion to Modify Sentence - Utah federal court
	E	Transcript - Utah federal court
	F	Note - copy of assigned note
	G	Note - copy of note

1
2 DATED this ___ day of November, 1998.

3
4 
5 John Mitchell
6 2445 5th Avenue, #200
7 San Diego, CA 92101
8 Ph. 619-237-9155
9 Fax 619-237-0128

10 Copy of the foregoing mailed
11 this ___ day of November, 1998 date, to:

12 James Brannigan
13 Asst. U.S. Attorney
14 Federal Building
15 880 Front Street, Rm. 6293
16 San Diego, CA 92101-8893
17 Ph. 619-557-65769

18 Kenneth Ramsdell
19 Probation Officer
20 401 W. A, Suite 500
21 San Diego, CA 92101
22 619-557-5261

23
24
25
26
27
28
a:clients\conte.obj

RANDALL GAITHER #1141
Attorney for Defendant
321 South 600 East
Salt Lake City, Utah 84102
Telephone: (801) 531-1990

**IN THE THIRD JUDICIAL DISTRICT COURT, SALT LAKE COUNTY
MURRAY DEPARTMENT, STATE OF UTAH**

STATE OF UTAH,	)	ORDER SETTING ASIDE PLEA
	)	AND VACATING JUDGMENT
Plaintiff,	)	OF CONVICTION
)	
vs.	)	Judge BURTON
)	
RUSSELL JOHN CONTE,)	
	)	Case No. 911001396
Defendant.)	

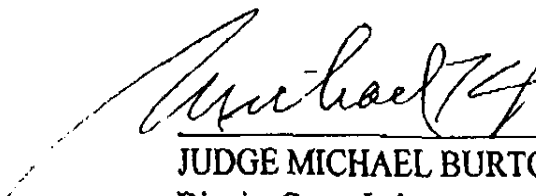
The above entitled matter came before the Honorable Judge Michael Burton on the 29th day of September, 1998. The State was present and represented by the Salt Lake District Attorney's Office and the Defendant was present and represented by Randall Gaither, Attorney at Law. Based upon the Motion of the Defendant and good cause appearing:

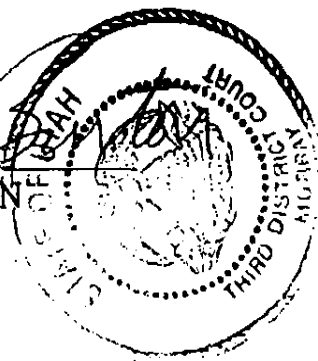
IT IS HEREBY ORDERED that based upon Rule 11 of the Utah Rules of Civil Procedure, the plea of guilty is set aside and the Judgment and Conviction is vacated and the matter ~~shall be set for further proceedings by the clerk of the Court~~ *is dismissed.*

WKS

Exhibit 1 A

DATED this 29 day of September, 1998.


JUDGE MICHAEL BURTON
District Court Judge

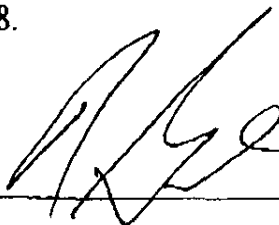


DELIVERY CERTIFICATE

I hereby certify that on the 29 day of September, 1998, a true and correct
copy of the foregoing ORDER was delivered to:

SALT LAKE DISTRICT ATTORNEY'S OFFICE
231 EAST 400 SOUTH
SALT LAKE CITY, UTAH 84111

DATED this 29 day of September, 1998.



STATE OF UTAH) ss
COUNTY OF SALT LAKE)
I, THE UNDERSIGNED, CLERK OF THE DISTRICT
COURT OF SALT LAKE COUNTY, UTAH, DO HEREBY
CERTIFY THAT THE ANNEXED AND FOREGOING IS A
TRUE AND FULL COPY OF AN ORIGINAL DOCUMENT
ON FILE IN MY OFFICE AS SUCH CLERK.
WITNESS MY HAND AND SEAL OF SAID COURT
THIS 29 DAY OF September 19 1998
CLERK OF THE DISTRICT COURT
BY: Holly Ray DEPUTY



11-25-98

RANDALL GAITHER #1141
Attorney for Defendant
321 South 600 East
Salt Lake City, Utah 84102
Telephone: (801) 531-1990

**IN THE THIRD JUDICIAL DISTRICT COURT, SALT LAKE COUNTY
MURRAY DEPARTMENT, STATE OF UTAH**

STATE OF UTAH,)	
	)	MOTION TO SET ASIDE PLEA OF
	)	GUILTY AND JUDGMENT OF
Plaintiff,	)	CONVICTION
)	
vs.	)	Judge BURTON
)	
RUSSELL JOHN CONTE,)	
	)	Case No. 911001396
Defendant.)	


The Defendant, Russell Conte, hereby moves the Court to set aside the plea of guilty entered on May 13, 1992, and to set aside sentence and vacate the Judgment and Conviction on that same date on the following grounds and reasons:

1. The plea did not conform with the requirements of the Utah Rules of Criminal Procedure under Rule 11 and the plea was an involuntary plea and unconstitutional pursuant to the United States Constitution and Utah Constitution.
2. The Defendant has completely paid off in full the restitution and the victim, Rex Henderson, has no objection to the setting aside of the plea.
3. Submitted herewith is a Memorandum of Law in support of the Motion to set aside the plea and a copy of the transcript of the Change Of Plea.

Exhibit B

4. The Defendant will submit an Affidavit of the Defendant concerning this Motion.

DATED this 14th day of September, 1998.


RANDALL GAITHER
Attorney for Defendant

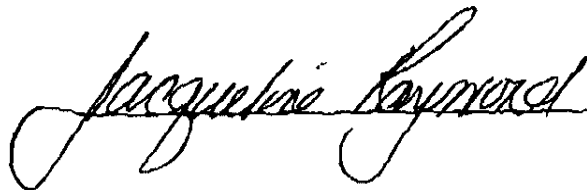
MAILING CERTIFICATE

I hereby certify that on the 18 day of September, 1998, a true and correct copy of the foregoing MOTION TO SET ASIDE PLEA OF GUILTY was mailed First

Class Mail, postage prepaid to:

SALT LAKE DISTRICT ATTORNEY'S OFFICE
231 EAST 400 SOUTH
SALT LAKE CITY, UTAH 84111

DATED this 18th day of September, 1998.



RANDALL GAITHER #1141
Attorney for Defendant
321 South 600 East
Salt Lake City, Utah 84102
Telephone: (801) 531-1990

**IN THE THIRD JUDICIAL DISTRICT COURT, SALT LAKE COUNTY
MURRAY DEPARTMENT, STATE OF UTAH**

STATE OF UTAH,

Plaintiff,

VS.

RUSSELL JOHN CONTE,

Defendant.

MEMORANDUM IN SUPPORT OF
MOTION TO SET ASIDE PLEA

Judge BURTON

Case No. 911001396

STATEMENT OF FACTS

1. The Information was filed on October 2, 1991, after having been transferred from the Salt Lake Circuit Court.
2. On May 13, 1992, the Defendant, Russell Conte, appeared before the Court with his attorney Randall Gaither and entered a change of plea.
3. A transcript of the Change of Plea Hearing is attached hereto as Exhibit A.
4. The Defendant pled guilty and was sentenced on May 13, 1992, to the offense of Attempted Forgery and the Court fined the Defendant \$600.00 and suspended \$75.00 jail and also ordered a payment of restitution.

5. The victim of the offence was Rex Henderson and Rex Henderson has been fully paid restitution and does not require a criminal conviction against the Defendant.

POINT I

THE COURT SHOULD GRANT THE DEFENDANT'S MOTION TO SET ASIDE

The Defendant, Russ Conte, was not examined concerning the entry of the plea by the Court pursuant to *Rule 11 of the Utah Rules of Criminal Procedure*. *Rule 11 of the Utah Rules of Criminal Procedure* states as follows:

The court may refuse to accept a plea of guilty or no contest,

and may not accept the plea until the court has found:

- (a) if the defendant is not represented by counsel, he has knowingly waived his right to counsel and does not desire counsel;
- (b) the plea is voluntarily made;
- (c) the defendant knows he has rights against compulsory self-incrimination, to a jury trial, and to confront and cross-examine in open court the witnesses against him, and that by entering the plea he waives all of those rights;
- (d) the defendant understands the nature and elements of the offense to which he is entering the plea; that upon trial the prosecution would have the burden of proving each of those elements

beyond a reasonable doubt, and that the plea is an admission of all

felony offenses;

(e) the defendant knows the minimum and maximum sentence that may be imposed upon him for each offense to which a plea is entered, including the possibility of the imposition of consecutive sentences;

(f) if the tendered plea is a result of a prior plea discussion and if in what agreement has been reached; and

(g) the defendant has been advised of the time limits for filing any motion to withdraw a plea of guilty or no contest.

In *State v. Smith*, 876 P.2d 566, 739 P.2d 1119 (Utah Adv. Rep. 9 (Ct.App 1994)) the Court stated:

The trial court has abused its discretion as a matter of law if it does not permit a defendant to withdraw a plea that was not made in strict compliance with *Rule 11 of the Utah Rules of Criminal Procedure*. *State v. Smith*, 812 P.2d 470, 476 (Utah App. 1991), cert. denied, 836 P.2d 1383 (Utah 1992). "The purpose of Rule 11(5) and (7) is to assure that a plea of guilty or no contest is knowing and voluntary." A motion to withdraw a plea made prior to sentencing should generally be liberally granted, provided good cause is shown. *State v. Gallegos*, 738 P.2d 1040, 1042 (Utah 1987); *State v. Thorup*, 841 P.2d 746, 747 (Utah App. 1992), cert. denied, 853 P.2d 897 (Utah 1993).

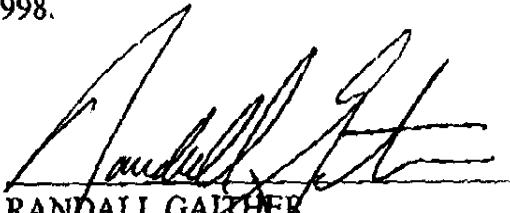
Here, the Court did not use an Affidavit or Statement In Advance Of Plea. The Defendant was not told about any specific date or time in which a motion to set aside the plea was required to be filed.

In *State v. Price*, 837 P.2d 578 (Ct. App. 1992), the Utah Court of Appeals reviewed a plea in which the Defendant executed a statement of the Defendant and was

also advised of his right to move to set aside the plea within thirty days. The court overruled the motion to withdraw in that case and stated and recited other cases which indicated that *Rule 11(e) of the Utah Rules of Criminal Procedure* squarely places on trial courts the burden of insuring constitutional plea and that Rule 11 requirements be complied with when a plea is entered citing *State v. Maguire*, 830 P.2d 216 (Utah 1992), and the court noted that one Plea Affidavits are probably incorporated in the record they may form a basis for finding of a Rule 11 compliance. The court went on to note that the Utah Courts have required strict compliance with Rule 11.

The court also noted that *Utah Code Annotated* Section 77-13-6(2)(b), provides that a request to withdraw a plea of guilty or no contest shall remain within thirty days from the entry of the plea. The court noted that this limit must be construed in relation to Rule 11(5)(g) that indicates that a court must advise the Defendant of his time to file a motion to withdraw the plea of guilty. The court said that Rule 11(6) provides that the failure to advise the Defendant of the time limits for filing any motion to withdraw a plea of guilty is grounds for extending the time to file a motion under *Utah Code Annotated* Section 77-13-6.

DATED this 14th day of September, 1998.


RANDALL GAITHER
Attorney for Defendant

RANDALL GAITHER #1141
Attorney for Defendant
321 South 600 East
Salt Lake City, Utah 84102
Telephone: (801) 531-1990

**IN THE THIRD JUDICIAL DISTRICT COURT, SALT LAKE COUNTY
MURRAY DEPARTMENT, STATE OF UTAH**

STATE OF UTAH,	)	ORDER SETTING ASIDE PLEA
	)	AND VACATING JUDGMENT
Plaintiff,	)	OF CONVICTION
)	
vs.	)	Judge BURTON
)	
RUSSELL JOHN CONTE,)	
	)	Case No. 911001396
Defendant.)	

The above entitled matter came before the Honorable Judge Michael Burton on the 29th day of September, 1998. The State was present and represented by the Salt Lake District Attorney's Office and the Defendant was present and represented by Randall Gaither, Attorney at Law. Based upon the Motion of the Defendant and good cause appearing:

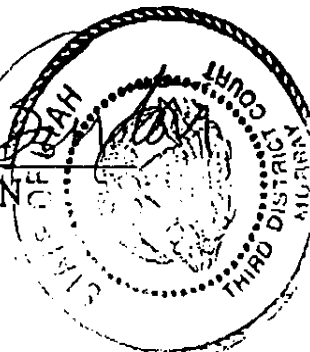
IT IS HEREBY ORDERED that based upon Rule 11 of the Utah Rules of Civil Procedure, the plea of guilty is set aside and the Judgment and Conviction is vacated and the matter ~~shall be set for further proceedings by the clerk of the Court~~ *is dismissed.*

WFB

Exhibit C

DATED this 29 day of September, 1998.


JUDGE MICHAEL BURTON
District Court Judge

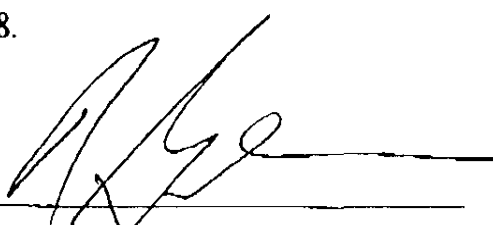


DELIVERY CERTIFICATE

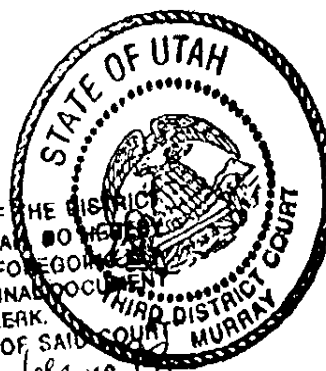
I hereby certify that on the 29 day of September, 1998, a true and correct
copy of the foregoing ORDER was delivered to:

SALT LAKE DISTRICT ATTORNEY'S OFFICE
231 EAST 400 SOUTH
SALT LAKE CITY, UTAH 84111

DATED this 29 day of September, 1998.



STATE OF UTAH)
COUNTY OF SALT LAKE) ss
I, THE UNDERSIGNED, CLERK OF THE DISTRICT
COURT OF SALT LAKE COUNTY, UTAH, DO HEREBY
CERTIFY THAT THE ANNEXED AND FOREGOING IS A
TRUE AND FULL COPY OF AN ORIGINAL DOCUMENT
ON FILE IN MY OFFICE AS SUCH CLERK.
WITNESS MY HAND AND SEAL OF SAID COURT
THIS 29 DAY OF September, 1998
CLERK OF THE DISTRICT COURT
BY: Holly Kay DEPUTY



RANDALL GAITHER #1141
Attorney for Russell J. Conte
321 South 600 East
Salt Lake City, Utah 84102
Telephone: (801) 531-1990

FILED IN UNITED STATES DISTRICT
COURT, DISTRICT OF UTAH

SEP 24 1992

By MARKUS B. ZIMMER, CLERK
DEPUTY CLERK

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH, CENTRAL DIVISION

UNITED STATES OF AMERICA,
Plaintiff,
vs.

RUSSELL J. CONTE,
Defendant.

MOTION TO MODIFY SENTENCE

Case No. 91-CR-0267-A

The Defendant, Russell J. Conte hereby moves the Court to modify, correct or amend the previous judgment to substitute as punishment pursuant to Section 5C 1.1(E) of the Federal Sentencing Guidelines. A halfway house or other similar residence facility or home detention in lieu of the balance of the imprisonment of the Defendant in the Davis County Jail. This Motion is based upon the information from the Defendant's treating physician to be submitted to the Court and Counsel prior to the hearing which indicated that the Defendant's diagnose mental condition has deteriorated and good cause exist to place the Defendant in confinement other than the Davis County Jail.

DATED this 23rd day of September 1992.


RANDALL GAITHER
Attorney for the Defendant

Exhibit D

1 to go to a different environment. And the doctor feels that
2 would be very helpful if that type of confinement could take
3 place.

4 And it's my understanding the U.S. Attorney --

5 THE COURT: All of this is in the doctor's letter?

6 MR. GAITHER: I will jump in my car and go back and

7 obtain it. I apologize it's my mistake. The doctor got it
8 to me today. I made copies and I grabbed the file. I must
9 have stuck them in the wrong file, and that is my mistake.

10 It's my understanding Mr. Olsen has to leave, and
11 the government does not oppose changing his confinement to
12 the halfway house. If the Court would like to hear from the
13 government and make a motion, will you sit down.

14 MR. OLSEN: The government has no objection to that
15 request that he be released to a halfway house at this point,
16 that's correct.

17 THE COURT: Have you talked to Mr. Campbell?

18 MR. OLSEN: I have. Through her secretary that
19 information was conveyed to me.

20 MR. GAITHER: I had explained in advance what the
21 letter would probably say as I talked with her last Monday.
22 In fact I talked with her before that as soon as I heard and
23 had the date set for the Court.

24 THE COURT: Well, be seated. I'll talk with the
25 probation agent.

Exhibit E

1 MR. GAITHER: Thank you.

2 THE COURT: Do you have someone at your office that
3 could find that.

4 MR. GAITHER: While you're talking, I'll see if she
5 can find it and fax it down to the Marshal's office, we
6 should have it by then, or I can be back in five minutes.

7 THE COURT: Five minutes?

8 MR. GAITHER: I drive fast.

9 THE COURT: Where is your office, Mr. Gaither?

10 MR. GAITHER: Third South and Sixth East.

11 THE COURT: Okay. Well, you go get it. It should
12 be in the file.

13 MR. GAITHER: Okay. Thank you. I will go get the
14 letter. I'll be right back.

15 THE COURT: Okay. We'll be in recess.

16 (Recess.)

17 THE CLERK: The Court resumes its session.

18 MR. GAITHER: Your Honor, if I may approach the
19 bench.

20 THE COURT: You may.

21 Okay. The letter may be placed in the record.

22 MR. GAITHER: Yes, that's the original for the
23 Court. Thank you.

24 THE COURT: The report from the doctor is one of
25 serious portent and deserves the consideration which you've

1 requested.

2 I've talked with the probation agent. I've
3 determined to correct the three months in jail, jail-type
4 facility, to six weeks, which would mean he had completed
5 that, and then six weeks in the CTC and then three months in
6 a home.

7 MR. GAITHER: Thank you, Your Honor.

8 THE COURT: All right.

9 And the sentence will be corrected. Thank you.

10 MR. OLSEN: Thank you, Your Honor.

11 MR. GAITHER: Thank you, your honor.

12 Your Honor, as far as making the order is
13 concerned, is that my responsibility?

14 THE COURT: No, it will be the U.S. Attorney.

15 MR. OLSEN: That only makes sense, of course.

16 Thank you, Your Honor.

17 (Whereupon, the matter was concluded.)

18 * * *

19

20

21

22

23

24

25

C E R T I F I C A T E

Noted 17 Utah

COUNTY OF SALT LAKE

I, Karen Murakami, a Certified Shorthand Reporter and Notary Public in and for the State of Utah, do hereby certify that the foregoing transcript of proceedings was taken before me at the time and place set forth herein and was taken down by me in shorthand and thereafter transcribed into typewriting under my direction and supervision;

That the foregoing pages contain a true and correct transcription of my said shorthand notes so taken.

IN WITNESS WHEREOF, I have hereunto set my hand and seal this 6th day of April, 1994.


KAREN MURAKAMI, CSR, RPR

My commission expires:
January 14, 1997

Rec
11/30/98
Dn

PROMISSORY NOTE

Torrance, California

November 22, 1995

On or before December 31, 1996, for value received, Robert Jones ("maker") promises to pay to the order of MI, LC a Utah limited liability company ("Payee"), at 10 Mountain Springs Parkway, Springville UT 84663, the sum of \$265,000, with interest on the unpaid balance from the date hereof at the rate of six percent (6%) per annum. Each payment shall be credited first to interest then due, and then to principal. Should default be made in the payment of any installment of principal and interest shall, at the election of the holder, become immediately due and payable without notice. Any payment hereunder shall not be deemed to be in default only if not made within ten (10) days of the date when due. If suit be brought on this note to enforce payment, maker promises to pay costs of suit and sum as the court may fix as attorney's fees.

This note may be prepaid, in whole, or from time to time in part at the option of the maker at any time without payment of any premium or penalty. In the event of prepayment in part, interest after prepayment shall accrue only on the unpaid balance.

This note is secured by \$19,000 shares (the "Collateral") of the Common Stock of Commonwealth Thrift, a California corporation, represented by Certificates Number 22 and 24. Maker hereby grants a security interest in and to (the "Collateral") and any proceeds thereof. Payee shall return to Maker, by personal messenger or courier, and release from this security interest, within seven (7) days after payment in full of the outstanding balance of this Note, the certificates representing the Collateral, and the security interest in such shares shall then terminate.

Payee shall be entitled to foreclose upon the Collateral and exercise the rights of a secured party under the California Commercial Code in the event that Maker materially defaults under the provisions of this Note, if default has not been cured within 15 days after notice from Payee to Maker.

ROBERT JONES

EXHIBIT F

SEP- 2-98 WED 9:30 AM 0 -

FAX NO. 0000000000 P. 1

PROMISSORY NOTE

Torrance, California

September 28, 1994

On or before September 28, 1993, for value received, Robert Jones ("maker") promises to pay to the order of Kenneth Conte ("Payee"), at 4478 Shorebird Dr., Huntington Beach, CA 92649, the sum of \$250,000, with interest on the unpaid balance from the date hereof at the rate of six percent (6%) per annum. Each payment shall be credited first to interest then due, and then to principal. Should default be made in the payment of any installment of principal or interest when due, then, or at any time during such default, the entire amount of unpaid principal and interest shall, at the election of the holder, become immediately due and payable without notice. Any payment hereunder shall not be deemed to be in default only if not made within ten (10) days of the date when due. If suit be brought on this note to enforce payment, maker promises to pay costs of suit and such sum as the court may fix as attorney's fees.

This note may be prepaid, in whole, or from time to time in part at the option of the maker at any time without payment of any premium or penalty. In the event of prepayment in part, interest after prepayment shall accrue only on the unpaid balance.

This note is secured by 519,000 shares (the "Collateral") of the Common Stock of Commonwealth Thrift, a California corporation, represented by Certificates Number 22 and 24. Maker hereby grants a security interest in and to (the "Collateral") and any all proceeds thereof. Payee shall return to Maker, by personal messenger or courier, and release from this security interest, within seven (7) days after payment in full of the outstanding balance of this Note, the certificates representing the Collateral, and the security interest in such shares shall then terminate.

Payee shall be entitled to foreclose upon the Collateral and exercise the rights of a secured party under the California Commercial Code in the event that Maker materially defaults under the provisions of this Note, if default has not been cured within 15 days after notice from Payee to Maker.

ROBERT JONES

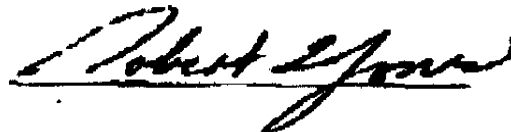


EXHIBIT C

~~2/5~~